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| Author(s) | TAKAHASHI, Koji, KASUGAI, Yasuo, FUKUDA, Isao |
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RESEARCH ON THE LEGAL PROBLEMS OF THE PORT MANAGEMENT SYSTEM IN JAPAN

Koji TAKAHASHI*, Yasuo KASUGAI**, Isao FUKUDA***

Port and Airport Research Institute*

Kyushu University**

Port and Airport Research Institute***

ABSTRACT: Across the world, port management is increasingly adopting a scheme of separating infrastructure and operations. In the midst of this global trend, Japan experienced the Great Hanshin and Awaji Earthquake in 1995 and the Great East Japan Earthquake in 2011, both of which devastated major ports, forcing Japan to face challenges related to its port management system. In addition, with major earthquakes expected to strike again in the future, it is urgent for Japan to solve the current problems. Japan's challenges have much in common with those faced by port management abroad. This paper has discussed the Japanese port management system, focusing on regional port management or diversified management; the kind of management necessary to make use of the knowhow of joint-stock companies and port management companies; and the development of the Super-hub Port policy since the Port and Harbor Law was enacted in 1950. It has also shown that port management by private companies has been required to safeguard the public interest since the Great East Japan Earthquake. This paper also shed light on the fact that the power of the national government is limited because it entrusts port management to port authorities, although port management and operations seriously impact the national interest. As a result, this paper was able to prove the following in analyzing regional port management by port management companies:

- 1) The power of the Minister of MLIT is weak both in ordinary times and in disaster.
- 2) Management by port management companies is not independent enough of port authorities.
- 3) For port management companies to expand their operations, it is imperative to examine the possibility of the national government financing them or giving them debt guarantees.

Considering these findings, the author proposes shifting to the new system to solve the legal problems of the port management system.

KEYWORDS: Port Management, Legal Problems, Disaster

1. INTRODUCTION

Across the world, port management is increasingly adopting a scheme of separating infrastructure and operations; this is also the case in Japan.

In the midst of this global trend, Japan experienced the Great Hanshin and Awaji Earthquake in 1995 and

the Great East Japan Earthquake in 2011, both of which devastated major ports, forcing Japan to face challenges related to its port management system. In addition, with major earthquakes expected to strike again in the future, it is urgent for Japan to solve the current problems. Japan's challenges have much in common with those faced by port management

abroad. This paper reveals legal problems with the current port management system in Japan, which is designed to separate infrastructure and operations. It also contributes to the risk management by foreign ports adopting the scheme.

2. AN OVERVIEW OF THE JAPANESE PORT MANAGEMENT

Figure 1 shows the locations of 126 ports and harbors fulfilling important functions in Japan.

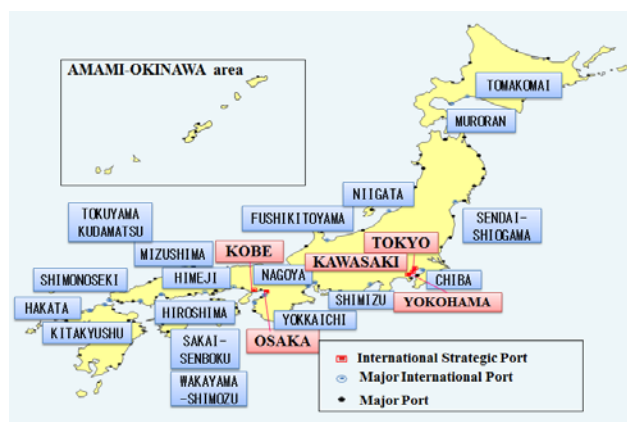


Figure 1 Location of Ports in Japan

Figure 2 shows the classification of ports and harbors. There are five “International Strategic Ports,” which serve as bases for an international maritime transport network and efficiently link the international network with the domestic maritime transport network. Eighteen “Major International Ports,” serve as bases for the international “Major Ports,” 103 in total, which serve as bases for the domestic sea transportation network and other ports critically tied to the national interest. Table 1 shows the types of port authorities managing these ports and harbors. One characteristic of the Japanese port management system is that local governments manage all ports and harbors.

The current port management system is set out in the Port and Harbor Law, which was enacted

under the supervision of the General Headquarters of the Allied Powers in Occupied Japan (GHQ) in 1950. Table 2 describes the division of roles between the national government and port authorities based on the Law. The national government is not directly involved in port management, confining itself to mandating basic policies for port construction and management or technological standards for facilities. Port management is entrusted to port authorities (local governments).



Figure 2 Classifications of Ports

Table 1 Type of Ports and Port Authorities

| Division | Total number | Port Authorities | | | | | Article 56 ports |
|---|--------------|------------------|----------------|------------------------|------------------------|-------------|------------------|
| | | Prefectures | Municipalities | Port Management bodies | Municipal Associations | Total | |
| International Strategic Ports | 5 | 1 | 4 | 0 | 0 | 5 | - |
| Major International Ports | 18 | 11 | 4 | 0 | 3 | 18 | - |
| Major Ports | 103 | 83 | 16 | 1 | 3 | 103 | - |
| Local Ports (including harbors of refuge) | 810 (35) | 507 (29) | 303 (6) | 0 (-) | 0 (-) | 810 (35) | - |
| Article 56 ports | 61 | - | - | - | - | - | 61 |
| Total | 997 | 602 | 327 | 1 | 6 | 936 | 61 |

•Port Management bodies: Formed based on the Port and harbor Law.

•Municipal Associations: Formed based on the Local Autonomy Law.

•Article 56 ports: These ports have been decreed by the prefectural governor as marine districts without any district boundaries, in order to ensure the absolute minimum necessary regulation, and have been set aside for use as ports in the future.

Table 2 Major Roles in Port Management

| National Government | Port Authorities |
|--|---|
| <ul style="list-style-type: none"> Policy formulation for the development and administration of nationwide ports and harbors Establishment of necessary laws and regulations Providing advice and guidance on port administration and operation to port management bodies Authorizing development plans for major ports Financial assistance for port management bodies in relation to port construction projects Implementation of port construction projects (projects under the direct control of the national government) Improvement and maintenance of shipping channels outside the port area Establishment of technological standards for planning, design, and construction of ports and harbors Surveys and research concerning port technology | <ul style="list-style-type: none"> Formulation of port development/management plan Construction and maintenance of port facilities Permission for and restrictions on facility use in port management districts (marine districts, land districts) Leasing and management of port facilities Setting and collection fees for use of port facilities Establishing conditions for providing port services Land reclamation in harbor districts Environmental protection in ports and harbors Statistics collection for ports and harbors Marketing and promotion of ports and harbors |

Sixty years after the Port and Harbor Law was enacted, however, the inefficiency of management by local governments became widely recognized, which led to the introduction of the port management company system. This system used private companies to manage ports, thereby separating port infrastructure from port management. This paper will review the history leading to the introduction of this system.

3. STRIVING FOR REGIONAL PORT MANAGEMENT

Japanese local governments were established in accordance with the Local Autonomy Law. Table 3 is an excerpt from the law stipulating the roles of local governments and the national government. According to the law, the role of a local public body is to “promote the welfare of its residents, for which purpose it shall carry out a wide range of tasks in the autonomous and comprehensive performance of local public administration,” while the role of the national government is to enforce policies on the national level.

Table 3 Role of Local Government according to the Local Autonomy Law

| |
|---|
| <p>Article 1-2 (1) The task of a local government shall be to promote the welfare of its residents, for which purpose it shall carry out a wide range of tasks in the autonomous and comprehensive performance of local public administration.</p> |
|---|

On the other hand, activities related to the logistics part of port activities are administered regionally, beyond the jurisdiction of local governments. Ports are also managed in accordance with international agreements.

Given the limited role of local governments, how did regional port management schemes

develop?

3.1 The first period: Management by public corporations

The national government enacted the Foreign Trade Terminal Public Corporation Law in 1967, establishing two public corporations, Keihin and Hanshin. The corporations took sole responsibility for regional port administration, wielding authority over port authorities (local governments). The corporations also constructed and managed the regional container terminals necessary to manage marine container logistics. As part of administrative reform by the national government striving for small government, however, the corporations were dissolved in 1982. Port administration was returned to local governments

3.2 The second period: The introduction of private management through the Super-hub Port System

The national government revised the Port and Harbor Law and introduced the Super-hub Port System in 2005. In three areas — Keihin, Hanshin, and Ise Bay — the system enabled a single private company to manage contiguous, multiple container terminals as a whole, allowing it to pursue economies of scale in its operations. This revision created the current system of regional port management by private companies.

3.3 The third period: Private regional management through the port management company system

The national government revised the Port and Harbor Law a second time in 2011, establishing the scheme that separates infrastructure and operations. This revision has entrusted port management to free management by private companies, creating conditions for them to engage in regional

management. More than sixty years after the Port and Harbor Law of 1950, the regional management system has become a reality.

4. REMAINING CHALLENGES FOR PORT MANAGEMENT

In the wake of this complicated history, the port management company system bears a heavy responsibility to implement port policies. However, the system faces still other challenges. Port management companies are required to make use of the knowhow accumulated in private companies while looking out for the public interest. Furthermore, because Japan does not have a long tradition of port management by private companies, these companies face a series of challenges. For example, if a particular port authority (local government) invests large amounts of money in a port management company, the local government, as an investor, can press the company to act for the sole benefit of the local community, rather than the interests of the company.

To improve the management environment faced by port management companies, the author examined challenges for port management helping enhance global competitiveness. Table 4 is the results.

Table 4 Remaining Challenges

| | Port Authorities | Port Management Company |
|--|--|--|
| Management | Limited guidance based on a port plan | Limited financing by port authorities 1) Creative management and quick decision-making 2) Regional or diversified management |
| Supervisory power of the national government | National government lacks the power to encourage port authorities to consider the best interests of the whole | There is an obligation to report |
| Disaster | Limited capability to respond 1) Obligation to report 2) Disposal 3) Management of a regional network 4) Quickness | Lack of measures to restore management quickly 1) Obligation to report |
| Finance | Principle of limited income | Financial support to maintain and expand navigation routes |

Creative management, quick decision-making, and regional or diversified management covering multiple ports to streamline management through economies of scale are essential means for port management companies. In addition, what is optimal for a single port is not optimal for Japan as a whole; the country needs a system that “aims for the optimization of the whole rather than an optimization of parts.” Therefore, this paper points out weaknesses of the current system.

4.1 Creative management and quick decision-making

Port authorities are local governments, which as public institutions are required to judge and act fairly and impartially. Port authorities are not permitted to set management policies that are favorable or unfavorable to particular companies. This emphasis on fairness or impartiality might hamper creative management and quick decision-making by port management companies.

In addition, port management companies are entitled to plan their business and make management plans on their own. If they receive contributions from particular port authorities, however, they may have difficulty in making decisions that are unfavorable to the authorities, even if the decisions are appropriate on a regional scale. For port management companies to manage creatively and make decisions quickly, they need to be independent of the restraints of local governments.

On the other hand, because port management must be consistent with the national interest, the national government needs the power to supervise those companies.

4.2 The national government’s involvement in building infrastructure

For port management companies to manage ports smoothly under the scheme of separating infrastructure and operations, they need to be provided with ample infrastructure. If it is decided that a local port authority can bear the cost of building an infrastructure, the body may delay building the infrastructure if it does not benefit the local community. Generally speaking, local governments are willing to build infrastructure that benefits their communities but not the country, but not to build infrastructure that benefits the country but not their communities. The national government needs to secure the power to get involved in building port infrastructure.

4.3 The national government's involvement in management and operations

To support creative management and promote management beneficial to the country, the national government needs to secure the power to get involved in port management.

In addition, although there are many stakeholders involved in ports, no one has the power to take the initiative in coordinating those stakeholders. The power to facilitate the coordination should be granted to the national government.

5. PORT MANAGEMENT IN DISASTER

The Great East Japan Earthquake in March 2011 completely destroyed ten major international ports, mainly on the Pacific side in the Tohoku Region. Although local port authorities should have restored port functions as soon as possible, they appropriated limited human resources, equipment, materials, and financial resources for the relief of affected residents. As a result, only port personnel worked on restoring the ports. Such policies were natural and in accordance with the spirit of the above-mentioned Local Autonomy Law stipulating “tasks in the

autonomous and comprehensive performance of local public administration.” In terms of port management and operations, however, it is necessary to apply the following three lessons as a hedge against another major disaster.

5.1 Lesson 1: An essential backup system

Figure 3 illustrates that unaffected ports on the Japan Sea side operated as backups, taking over the logistical functions of affected ports on the Pacific side. Because it takes anywhere from a few months to a few years to restore damaged ports, it is essential to develop a backup system through cooperation among ports.



Figure 3 Logistics for Goods from Ports on the Japan Sea (left) to Ports on the Pacific Side (right)

If different authorities or port management companies manage ports, however, the activation of a backup system can be delayed. It is desirable to develop a backup system run by one port

management body or company. To establish a backup system as a contingency against a major earthquake affecting a wide area, it might also make sense for a centralized port management body with an organizational structure covering the whole country to manage and operate ports and harbors.

5.2 Lesson 2: The loss of the function of a port Authority

As mentioned earlier, immediately after the earthquake, port authorities (local governments) appropriated limited human resources, equipment, materials, and financial resources for the relief of affected residents, leaving the restoration of ports to port personnel. Although these policies were based on the Local Autonomy Law, they resulted in those bodies neglecting port management functions. A comparison of infrastructure clearing operations of roads versus ports clearly reveals that roads, directly controlled by the national government, were rapidly cleared, whereas ports took several months to clear.

The fundamental problem is that the Port and Harbor Law does not anticipate that a port authority will neglect its functions in times of disaster. To avoid the possibility that port authorities (local governments) will become functionally paralyzed and fail to fulfill their management functions, alternative measures should be introduced, such as regional port management, port management by other port authorities, or management by the national government, and the restoration of devastated ports should be managed by other bodies.

5.3 Lesson 3: Financial problems caused by the annual accounting system and complex ordering procedures

The national government and local governments use an accounting system that requires them to include the expenditure for a purchase to be made next year in the budget for the current fiscal year. In addition,

to order construction or supplies, they have to follow complex procedures including gathering price estimates and issuing public notice, which take several months. Beyond these procedures, in the case of restoring a disaster-stricken area, the national government has to assess the damage so that the order reflects the extent of the damage, which further extends delays. Among the ten major international ports affected by the earthquake of 2011, Hachinohe Port was the first to be restored, but the restoration was not completed until August 2013, two years and five months after the earthquake. Restoration work on the other ports is still underway.

On the other hand, roads directly controlled by the national government, the Shinkansen, and expressways were restored quickly. It is necessary to introduce a contract method free of the annual accounting system and complex ordering procedures.

5.4 The national government's involvement in disaster response

Major disasters, where local public bodies as a whole are busy providing relief to affected residents, necessitate the involvement of the national government. In countries such as Australia, where a state and county system is used, it is replaced by the “involvement of state and county governments.”

For the national government's involvement in a disaster to be effective, port management bodies and companies need to be obliged to report the damage to the national government. The national government in turn needs to control the disposal of debris in restoration, and it needs to be able to decide for other bodies. The details are as follows.

5.4.1 An obligation to report disaster damage

One characteristic of Japanese ports and harbors is that, in a disaster, port authorities or management companies do not have an obligation to report the

damage to the national government. The national government cannot collect information about the damage through legal systems. On the other hand, operators of railways or airports are obliged to report accidents to governmental bodies such as the Ministry of Land, Infrastructure, Transport and Tourism (Minister of MLIT), not only in cases of disaster but also in ordinary times. To facilitate the sharing of information, the obligation to report in disaster and ordinary times should also apply to port authorities and management companies.

5.4.2 Disposal Right

In emergencies, local port authorities have the legal right to dispose of debris or flotsam and to enter others' premises; the national government does not. To facilitate rapid restoration in major disasters, these legal rights should be granted to the national government as well as port authorities.

5.4.3 The power to decide priorities in restoration efforts

It is crucial to decide in terms of a nationwide network which ports should be first restored. However, neither port authorities (local governments) and management companies nor the national government has the power to make this decision. As a result, the decision is made through consultation, but reaching an agreement can be delayed when stakeholders have conflicting interests. For the sake of the nationwide network, the national government needs to be the decision-maker when prioritizing restoration.

6. LEGAL PROBLEMS

The above discussion reveals that the current port management system, where port authorities (local governments) manage the ports, has the following legal problems.

6.1 The limitation of port management and operations by local governments bordering the sea

The Port and Harbor Law enacted in 1950 allows only localities bordering the sea to participate in the establishment of port authorities.

It is questionable whether administrative decisions by local governments can appropriately manage ports when the scale of port logistics is expanding, domestically and internationally.

6.2 The port management system is divorced from the spirit of the Local Autonomy Law

According to the Local Autonomy Law, a local public body's function is to "promote the welfare of its residents, for which purpose it shall carry out a wide range of tasks in the autonomous and comprehensive performance of local public administration." Port management by multiple local governments brings different benefits depending on the bodies. Is it possible to maintain free port management?

6.3 The risk of the breakdown of port management and operations

The Port and Harbor Law does not anticipate that a port authority could cease to function. To avoid the possibility that port authorities (local governments) could become functionally paralyzed, alternative plans should be introduced, such as regional port management, port management by other port authorities, or management by the national government (or state and county governments).

6.4 Creative management, pursuing economy of scale while safeguarding the public interest

For port management companies to manage freely and creatively, it is important to provide a management environment in which they are free of

the administrative restraints imposed by local governments and can pursue economies of scale by, for example, managing multiple ports as one system.

On the other hand, to secure the public interest in port management, the then Minister of MLIT stated in the Diet: “Concerning these port management companies, I would like to safeguard the public interest through restrictions on holding too much stock, supervisory orders to the companies, or revocation of designation” (at the Committee of Land, Infrastructure, Transport and Tourism of the House of Representatives on March 15, 2011). In addition, both Houses of the Diet passed a supplementary resolution stating: “The government shall take necessary measures particularly to safeguard the public interest, considering that port management companies become exclusive management bodies for public goods, ports and harbors” (at the Committee of Land, Infrastructure, Transport and Tourism of the House of Representatives on March 15, 2011 and the Committee of Land, Infrastructure, Transport and Tourism of the House of Councilors on March 31, 2011). It is necessary to safeguard the public interest while pursuing creative management.

7. SOLUTIONS TO LEGAL PROBLEMS

This section examines how to solve the above problems. There are helpful precedents in Japan. Table 5 and Table 6 compare port management companies with other transportation management companies. They comprise the airports of Narita, New Kansai, and Central Japan, which integrate infrastructure and operation; the Japan Railway Construction, Transport and Technology Agency (JRJT), which separates infrastructure and operation; and the Japan Expressway Holding and Debt Repayment Agency (JEHDRA), which also

separates infrastructure and operation.

The Narita International Airport was built and is managed and operated by a wholly government-sponsored special company; Kansai International Airport, by a special company financed by the national government, local governments, and private companies; and Central Japan International Airport, by a designated company financed by the national government, local governments, and private companies.

The Shinkansen separates infrastructure and operation: JRJT builds, owns, and leases infrastructure to JRs, which manage and operate it. The defining characteristics of the arrangement are as follows:

- 1) JRJT respects decisions made by JRs.
- 2) JRs pay only lease fees, which are set below JRs' profits, namely, the difference between their earnings with the Shinkansen and those without it. They do not have to pay construction costs.
- 3) Part of the income from the lease fees is allocated to pay construction costs, while the balance of the costs is paid by the national government (2/3) and local governments (1/3).

JRJT, financed almost entirely by the national government and local governments, builds and owns the Shinkansen, allowing JRs to use it exclusively. This is similar to ports: the national government or other bodies build port facilities, then lease them to port management companies.

Expressways also use the scheme of separating infrastructure and operations: JEHDRA owns road facilities and leases them to Nippon Expressway Companies (NEXCOs), which manage and operate them. The defining characteristic is that JEHDRA adjusts the loan fees so that NEXCOs do not generate profits.

Table 5 Management and Operations of Public Facilities by Private Companies

| | Port | Airport | | | Shinkansen | | Road | |
|-------------------|--|---|---|---|--|-----------------------|--|---|
| | Port Management Company (Inc.) | Narita International Airport (Inc.) | New Kansai International Airport (Inc.) | Central Japan International Airport (Inc.) | JR (East, West) | JR (Hokkaido, Kyushu) | Nippon Expressway (Inc.) (East, Central, West) | Expressway (Inc.) Metropolitan, Hanshin |
| Corporate form | Designated company | Special company | Special company | Designated company | Joint-stock company | Special company | Special company | Special company |
| Capital Structure | Local governments, Private companies | National government | National government, Local governments, Private companies | National government, Local governments, Private companies | Public | National government | National government | National government, Local governments |
| Management form | Separate infrastructure and operation, Owned by the national government and a port authority | Integrated infrastructure and operation | Integrated infrastructure and operation | Integrated infrastructure and operation | Separate infrastructure and operation, Owned by JRTT | | Separate infrastructure and operation, Owned by JEHDRA | |

Table 6 Management and Operations of Public Facilities by Private Companies

| | Port | Airport | | | Shinkansen | | Road | |
|--|---|--|--|--|----------------------|---|--|---|
| | | Narita | New Kansai | Central | JR (E,W) | JR (H,K) | N.E | E.M, E.H |
| Obligation of the national government to hold stocks | No | No | Yes, 1/2 or more | Yes, No regulations about the share | No | No | Yes, 1/3 or more | Yes, 1/3 or more held by the government and local governments |
| Support | <ul style="list-style-type: none"> Interest-free loan Tax break | <ul style="list-style-type: none"> Interest-free loan Financing by the national government Debt guarantee | <ul style="list-style-type: none"> Interest-free loan Financing by the national government and local governments Debt guarantee Tax-free reserve | <ul style="list-style-type: none"> Interest-free loan Financing by the national government and local governments Debt guarantee Tax-free reserve | No | <ul style="list-style-type: none"> Funds for stable management | <ul style="list-style-type: none"> Debt guarantee | |
| Supervision by the Minister of MLIT | Supervisory orders etc. | Supervisory orders etc. | Supervisory orders etc. | Supervisory orders etc. | Advisory orders etc. | Supervisory orders etc. | Supervisory orders etc. | Supervisory orders etc. |
| Administrator | Not a port authority | Airport administrator in the Airport Law | | | — | | No road administrator in the Road Traffic Law | |

The comparison of these cases reveals the following trends:

- 1) Kansai International Airport, Central Japan International Airport, Metropolitan Expressway, and the Hanshin Expressway are infrastructures closely tied to their local communities. Local governments finance them thanks to these close relationships. On the other hand, Narita International Airport and Nippon Expressways (East, Central, and West) are not locally financed.
- 2) Except for the completely privatized JR-East and JR-West, the national government finances infrastructure.
- 3) Except for the completely privatized JR-East and JR-West, the national government guarantees debt. (JR Hokkaido and JR Kyushu have funds for stable management.)
- 4) For all these infrastructural elements, the Minister of MLIT reserves the power to issue supervisory or advisory orders.

These forms of involvement by the national government and local governments suggest how to support port management companies. Namely, for port management companies to engage in regional management, it would be necessary to increase support from the national government, in the form of financing and debt guarantees, or to review financing by local governments.

8. CONCLUSION

This paper has discussed the Japanese port management system, focusing on regional port management or diversified management; the kind of management necessary to make use of the knowhow of joint-stock companies and port management companies; and the development of the Super-hub Port policy since the Port and Harbor Law was enacted in 1950. It has also shown that port

management by private companies has been required to safeguard the public interest since the Great East Japan Earthquake. This paper also shed light on the fact that the power of the national government is limited because it entrusts port management to port authorities, although port management and operations seriously impact the national interest.

On the other hand, in Japan, port management companies as well as the national government and port authorities have not yet accumulated enough management knowhow. Therefore, this paper compared port management with precedents — cases of the management of other infrastructural elements adopting the scheme of separating infrastructure and operation — to see what kinds of problems should be solved to achieve the goal of enhancing Japan's global competitiveness through aggressive management by fledgling port management companies making use of private knowhow.

As a result, this paper was able to prove the following in analyzing regional port management by port management companies:

- 1) The power of the Minister of MLIT is weak both in ordinary times and in disaster.
- 2) Management by port management companies is not independent enough of port authorities.
- 3) For port management companies to expand their operations, it is imperative to examine the possibility of the national government financing them or giving them debt guarantees.

Considering these findings, the author proposes shifting to the following system to solve the legal problems of the port management system: Port management strategy follows the precedent of separating infrastructure and operation, and

- 1) The creativity of port management companies is respected. Company management is placed outside

the jurisdiction of local governments; or the bodies' involvement is limited or eliminated. The national government finances the companies.

2) Public institutions build infrastructure with financial support from the national government, leasing them to port management companies.

3) To safeguard the public interest, the national government obliges port management companies and public institutions to report disaster damage and reserves the power to get involved in their disaster management.

The author hopes that, considering in the Japanese strategies introduced in this paper, those involved in port management across the world will pursue the ideal port management system for their own countries.

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